IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

R.S.A. No. 38 of 2005.

Judgement reserved on:

Date of decision : May 16, 2006.

Daulat Ram ……. Appellant.

Versus

Smt. Darshanu Devi ……. Respondent.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the appellant: Mr. G.R.Palsra, Advocate.

For the respondent: Mr. P.C.Sharma, Advocate.

Surjit Singh J. (Oral).

Heard and gone through the record. Plaintiff- respondent Darshanu Devi filed a suit for possession of land bearing khasra No. 444/279 against the appellant- defendant, alleging that earlier she had filed a suit for permanent prohibitory injunction in respect of two khasra numbers, i.e. khasra No. 444/279 and 446/281, seeking issuance of permanent prohibitory injunction, against the defendant-appellant from interfering in her possession over the said two khasra numbers, but the court decreed the suit only in respect of khasra No. 446/281 and as regards the other khasra number, i.e. 444/279, which is the subject matter of the present lis, it was held that the same was in possession of the appellant-defendant and therefore, injunction

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Whether reporters of local Papers may be allowed to see the judgment?

could not be issued against him and that the only remedy was to recover the possession of said khasra number by due process of law. Therefore, the respondent- plaintiff filed the suit for possession of khasra No. 444/279.

Appellant-defendant contested the suit and claimed that he himself was the owner of the suit land, having acquired it by way of adverse possession. The trial court has rejected the plea of the appellant- defendant and decreed the suit in favour of the respondent- plaintiff. Appeal filed by the appellant- defendant in the court of District Judge, stands dismissed. Hence the second appeal.

I have heard the learned counsel for the appellant- defendant. He has raised the following points:-

1. The District Judge, who has heard the appeal, had decided the earlier suit filed by the respondent- plaintiff as the Presiding Officer of trial court and, therefore, he should not have heard the appeal and on account of his having heard the appeal there has been miscarriage of justice.

2. The decree that has been passed by the trial court in the present matter pertains to khasra No. 447/279, whereas the claim was with respect to khasra No. 444/279.

3. Respondent- plaintiff while in the witness box as PW 1 stated that she was in possession of whole of the land owned by her and if that was so, the question of her filing a suit for possession of the suit land, i.e. khasra No. 444/279 did not arise.

4. In the earlier suit, an application was moved, under Order 6, Rule 17 of the Code of Civil Procedure, for amendment of the plaint so as to include the relief of recovery of possession of khasra No. 444/279, but that

> application was dismissed and therefore, the order of dismissal of that application operates as res judicata and that the relief of possession having not been sought in the earlier suit, the present suit is barred by Rule 2 of Order-2 of the Code of Civil Procedure.

As regards the first contention, the learned counsel has not been able to point out, how on account of the hearing of the first appeal by the same person, who decided the earlier suit as the Presiding Officer of the trial court, has resulted in miscarriage of justice, or even caused prejudice to the appellant The judgement delivered in the earlier suit had admittedly attained finality. In the said judgement, a categorical finding was recorded that the respondent- plaintiff was the owner of khasra No. 444/279, but the possession was with the appellant- defendant and in case the respondent- plaintiff so desired, she could dislodge the appellant-plaintiff from possession by due process of law. The two courts below have relied upon this judgement. In case there were any other Presiding Officers of the appellate court, then the one who has decided the appeal, he would have also used the judgement delivered in the previous case as a piece of evidence in the same way, as has been done by the Presiding Officer, who has decided the appeal.

The second contention in fact does not even need to be noticed. The writing of the wrong khasra number, in the operative part of the judgement of the trial court, makes no difference. This is just a clerical mistake. In the decree-sheet, the number has been correctly recorded.

As regards the third contention, respondent- plaintiff is a rustic woman, therefore, her saying that she is in possession of the suit

land makes no difference, particularly when relying upon the judgement in the previous case, wherein it has been held that she is out of possession, she has filed the suit and has tendered the said judgement as a piece of evidence to seek recovery of possession.

Rejection of the prayer for amendment of the plaint in the earlier suit also makes no difference, because the judgement in the earlier suit, which has attained finality, clearly reserve the right to the plaintiff- respondent to file a fresh suit, so as to recover the possession of the suit property. For this very reason, bar of Rule 2 of Order 2 of Code of Civil Procedure, is also not attracted.

From the above stated position, it is clear that no question of law, much-less a substantial question of law, arises. So the appeal is dismissed.

CMP No. 67 of 2005.

Interim order dated 28.2.2005, stands vacated and the application is dismissed.

May 16, 2006 **(Surjit Singh),**
(Hem) **Judge.**